IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

Nand Ram vs. The State of Rajasthan.

1. D.B.Cri. Appeal No.916/2001

Under Section 374 (2) Cr.P.C.. against the judgment dated 03.12.2001 passed by the Addl. Sessions Judge (Fast Track) , Bikaner in Sessions Case No. No.139/2001 (old No.98/1998).

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Date of Judgment: 20th August, 2007.

PRESENT

HON'BLE MR.JUSTICE BHAGWATI PRASAD
HON'BLE MR.JUSTICE MUNISHWAR NATH BHANDARI

Mr.H.S.S.Kharlia for the appellant.
Mr.JPS.Choudhary, Public Prosecutor.

BY THE COURT :(PER HON.MR.BHAGWATI PRASAD,J.)-

The present appeal has been filed by accused Nand Ram against the judgment of the learned Addl.Sessions Judge, Fast Track, Bikaner in Sessions Case No.139/2001 (old No.98/1998) dated 03.12.2001.

The prosecution was initiated with the lodging of the first information report at police station Mahajan on 09th August 1998 at 1.45 PM by Indraj. It was alleged in the report that his sister was married to the accused Nanad Ram. She has been killed by the accused by throttling. He has been constantly persecuting her for getting dowry . In this relation a Panchayat was also held. A report being FIR No.76/98 under section 302 IPC was registered and investigation was made. After investigation charge sheet was filed in the committal court, from where it was committed to the court of Sessions, and then made over to the trial court for trial .

At the trial, the trial court framed charge under section 302 IPC against the accused. The accused denied the charges and claimed trial. At the trial 10 witnesses were examined by the prosecution. The prosecution exhibited 34 documents. No defence witnesses was produced. However, the defence exhibited 3 documents, Ex.D/1, D/2 and D/3.

The trail court , after considering the case of the prosecution, convicted the accused appellant under section 302 IPC and sentenced him to life imprisonment and a fine of Rs.1500/- .

The learned counsel for the appellant urged that in this case, the prosecution has been guilty of fabricating evidence against the accused. The learned counsel has drawn the attention of the court towards the fact that PW/5 Dhanna Ram was sought to be examined as eye witness but he has turned hostile. There could not have been any eye witness in the case, and if there was an eye witness, the prosecution should have backed upon it. It was on the part of the prosecution to create evidence of the nature, whereby the prosecution was contemplating to get a conviction recorded against the accused by production of an eye witness, though no eye witness existed and this fact is corroborated by the fact that the witness has not supported the prosecution case.

The learned counsel further submitted that the first case of the prosecution was that the deceased died due to heart attack. This has been so deposed by few of the witnesses. Therefore, the prosecution has brought a false case that she died of heart attack to confuse the appellant of his defence. The learned counsel has further stressed that prosecution has tried to create an extra judicial confession , a weak piece of evidence, where words can be put in the mouth of the accused and it is very difficult to refute the allegation

but the trial court has not believed it. The prosecution has also tried to get a charge framed under section 304B IPC, but charge was not framed by the trial court and even the High Court did not favour the framing of charge under section 304B IPC.

Thus, the learned counsel has alleged that the prosecution has been changing its stand time and again and in that view of the matter, it can be presumed that since it had a very weak case, it brought a bundle of falsehood to create a case against the accused and thereby prejudiced the defence of the accused.

The learned counsel further stressed that the first information report was lodged on 09th of August, 1998 whereas death had occurred on 08th August, 1998, and, therefore, the FIR being delayed, prejudice has been caused to the accused. According to the learned counsel, PW/1 Brijlal to whom Inderraj approached and informed that he has been told that his sister has died of heart attack and asked him to accompany him and after that, this witness stated that she has not died of heart attack. Thus ,there was a material change in his statement and, therefore, there had been a concerted effort on the part of the prosecution to change the texture of the prosecution case and, therefore, the prosecution has been

prevaricating at a very large scale, and this has created a situation where reasonable doubt arises and it was not possible for the trial court to have convicted the accused with the aid of Section 106 of the Evidence Act, 1872, by drawing a presumption that the husband is responsible for the death of the wife, when husband and wife are lone living together in a house, then husband alone is the person who knows as to what was the best circumstances which was obtaining within the four corners of the house.

Per contra, the learned counsel for the State , submitted that the only eye witness who having turned hostile, has also stated that his police statement was not recorded. Thus such an eye witness, cannot in any way, furnish any support to the case of the defence because such witness by its conduct, is one who tries to mis-lead the investigation. Firstly this witness has tried to mislead the investigation and then tried to mislead the court . He has been excluded from consideration. The learned Public Prosecutor submitted that the theory of heart attack has only come through such a witness who had been sent by the accused to inform the maternal family of the deceased. Thus, if anything has been stated by this witness about the cause of death , then it was the doing of the accused and the prosecution has nothing to do with that fabrication.

If this fabrication is to be read against any person then the accused is the first person against whom this should be read. The learned public prosecutor further stated that as regards the extra judicial confession is concerned, the witness has not in so many words stated that any extra judicial confession was made by the accused in his examination- in-chief . It is only in cross examination, where suggestions were made to him that the factum of extra judicial confession has broadly come. It cannot be stated that it is something which is fabricated, deliberately by the prosecution.

As regards the argument in relation to the charge of demand of dowry , the learned public prosecutor submitted that though there were allegations of demand of dowry but such demand being not covered by the definition of dowry, as contained in Dowry Prohibition Act 1961 which stands incorporated in Section 304B IPC, and therefore, the charge was not amended and the charge being not amended, no prejudice has been caused to the prosecution because charge under section 302 IPC simplicitor has been made out against the accused. Therefore this does not go any further. The stand of changing of the cause of death by the prosecution, is hardly of any consequence. Because such was the stand of the accused itself and that having been done at the instance of the defence itself the

defence cannot take advantage of it. The judgment of the learned trial court in all fairness has been based on the decisions of the Hon'ble Supreme Court reported in the following cases :

In Lekhraj v. State of Gujarat (AIR 1998 SC, 242), their Lordships of the Supreme Court held as under :

> "The absence of motive, however, puts the Courts on its guard to scrutinise the circumstances more carefully to ensure that suspicion and conjecture do not take place of legal proof."

In State of West Bengal v. Mir Mohammad Omar (2000 Cri.L.J., 2047) it was held :

> "But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts....".

In Ram Gulam Chaudhary vs. State of Bihar (AIR 2001 SC, 2842) the Hon'ble Supreme Court held:

> " Even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond

> reasonable doubt, but the section would apply to cases like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding death. The appellants by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference. ”

Thus, the learned counsel for the State has prayed that the appeal be dismissed.

We have heard learned counsel for the parties and have given our thoughtful consideration to the facts available on record.

The trial court has not believed the theory of extra judicial confession. Rightly so, because in examination- in- chief, there was no positive statement of the accused that he has murdered his wife. But then he has sent a wrong information to the maternal that she has died of heart attack. This conduct goes a long way. When maternals arrived, the lady was found to have died of strangulation. Though this fact is not mentioned in the inquest memo . but at that time no expert opinion was available. The deceased had numerous injuries on her person . The cause of death was not known to anybody else than the husband but he was not ready to divulge it . Therefore, it is not a question of material

importance.

The trial court has stated that the medical report is to the effect that she was strangulated. The trial court has also discussed the evidence available on record that husband and wife were living together alone in the house. No other person was the inmate in the house. In these circumstances, if the wife is found murdered ,then the responsibility squarely lies on the husband to show the circumstances in which she has died.

In the statement under section 313Cr.P.C. there is no explanation of the husband. The first information communicated to the maternals of the deceased is misleading that she has died of heart attack. Thus, not only that the accused has not given any explanation in his 313 statement but has tried to communicate wrong message to the maternals of the deceased.

The trial court has relied on the Supreme Court decisions quoted herein above, where, in such circumstances where a person is supposed to have exclusive knowledge of the fact, then he is supposed to divulge those facts and if he refrain from divulging those facts, then adverse inference is required to be drawn against

him. Relying on Section 106 Evidence Act, the trial court has presumed certain facts to be explained which were in exclusive knowledge of the accused and who had not informed anybody about it so much so to the trial court. In absence of any legitimate explanation under Section 313 Cr.P.C., and no defence being made out, the inference drawn by the trial court that where husband and wife were living together alone in the house, if one of them is found dead by strangulation, then husband owes responsibility to explain. If he has not explained, then on the basis that they had strained relations, inference has been drawn against the husband by the trial court, and we feel rightly so.

In that view of the matter, the appeal is considered merit-less and hence dismissed.

(MUNISHWAR NATH BHANDARI), J. **(BHAGWATI PRASAD), J.**

L.George